STATE OF MICHIGAN
IN THE SUPREME COURT

LINDA HODGE,	Supreme Court No. 149043
Plaintiff-Appellant,	Court of Appeals No. 308723
v	Wayne County Circuit Court No. 10-012109-AV
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	36th District Court No. 08-133735
Defendant-Appellee.	

_____/

BRIEF ON APPEAL OF AMICUS CURIAE AUTO CLUB INSURANCE ASSOCIATION

JAMES G. GROSS, P.L.C.
BY: JAMES G. GROSS (P28268)
Attorney for Amicus Curiae
AUTO CLUB INSURANCE ASSOCIATION
615 Griswold Street, Suite 723
Detroit, MI 48226
(313) 963-8200

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

CASES **PAGE(S)**

STATUTES & COURT RULES

STATEMENT OF INTEREST

AUTO CLUB INSURANCE ASSOCIATION (ACIA) is a reciprocal automobile inter-insurance exchange organized under MCL 500.7200 *et seq*. to sell motor vehicle insurance in Michigan. All such insurance policies include mandatory no-fault coverage for medical expenses incurred due to injuries arising out of motor vehicle accidents. ACIA issues approximately 25% of the motor vehicle policies in this State. It sells a high proportion of its policies in southeast Michigan.

That being so, ACIA has a substantial interest in the issues before this Court. Many of the cases improperly filed in the 36th District Court by Plaintiff's trial attorney can generously be described as "suspect". Indeed, the plaintiff's co-counsel in one of these cases admitted as much on the record. (See p 10, *infra*). The undersigned attorney is currently litigating four of the improperly filed cases. *Smith v AAA of Michigan Ins*, 36th District Court No. 06-160578-GC, Wayne County Circuit Court No. 14-014774-AV, Court of Appeals No. 327173; *Madison v AAA of Michigan*, 36th District Court No. 10-101514-NF, Wayne County Circuit Court No. 12-003994-AV, Court of Appeals No. 312880, Supreme Court No. 149145; *Williams v State Farm Mutual Automobile Ins Co*, 36th District Court No. 08-149021, Wayne County Circuit Court No. 14-015459-AV; *Williams v State Farm Mutual Automobile Ins Co*, 36th District Court No. 11-113174, Wayne County Circuit Court No. 14-014773-AV. ACIA has an obligation to the rest of its insureds to see that these cases are fairly litigated in the proper venue.

STATEMENT OF JURISDICTIONAL BASIS AND STANDARD OF REVIEW

The ACIA concurs in the statements of the parties and the other Amici Curiae.

STATEMENT OF QUESTION PRESENTED

I. IN CASES INVOLVING ONGOING INSURANCE OBLIGATIONS, AS OPPOSED TO FINITE MONETARY DAMAGES, FEDERAL CASE LAW LOOKS TO THE VALUE OF THE RIGHT ASSERTED BY THE INSURED TO DETERMINE THE JURISDICTIONAL AMOUNT. IN NO-FAULT CASES, IS THAT THE ENTITLEMENT TO LIFETIME MEDICAL EXPENSES?

Amicus Curiae ACIA contends that the answer should be, "Yes".

II. THE MOTIVATION TO FILE IN 36th DISTRICT COURT IS TO PREVAIL ON CASES THAT WOULD LOSE IN WAYNE COUNTY CIRCUIT COURT. THE SHAM JURISDICTIONAL ALLEGATION IN THE COMPLAINT IS NECESSARY TO THAT STRATAGEM. TO THE EXTENT THAT IT PURPORTS TO CONVEY THE VALUE OF THE RIGHT ASSERTED, IS IT A FRAUD ON THE COURT?

Amicus Curiae ACIA contends that the answer should be, "Yes".

INTRODUCTION

ACIA endorses the entirety of State Farm's presentation in its Brief on Appeal. It offers this brief in order to supplement that presentation in two respects.

The first is to provide this Court with federal case law which is more appropriate to first-party no-fault cases than that cited by Plaintiff. The authority discussed herein focuses on the total value of the right asserted by the plaintiff, rather than merely considering the sham jurisdictional allegations of Plaintiff's Complaint.

The second is to demonstrate the motivation for Plaintiff's attorney's filing these cases in the 36th District Court. The point of that discussion will be that the jurisdictional allegations in Mr. Fortner's[1] plaintiffs' Complaints are a sham, whose purpose is to facilitate litigating in a venue in which a plaintiff can prevail in cases which could not succeed in the Wayne County Circuit Court. As such, they are a fraud on the court.

[1]Michael Fortner, Esq., was the Plaintiff's trial attorney in the instant case, as well as in the other 36th District Court filings referenced in this brief.

I. IN CASES INVOLVING ONGOING INSURANCE OBLIGATIONS, AS OPPOSED TO FINITE MONETARY DAMAGES, FEDERAL CASE LAW LOOKS TO THE VALUE OF THE RIGHT ASSERTED BY THE INSURED TO DETERMINE THE JURISDICTIONAL AMOUNT. IN NO-FAULT CASES, THAT IS THE ENTITLEMENT TO LIFETIME MEDICAL EXPENSES.

In making this argument, ACIA does not concede that federal law applies here. ACIA agrees with the distinction drawn by State Farm at page 26 n 16 of its Brief on Appeal. The point here is that even if this Court were inclined to look to federal law, Plaintiff cites the wrong line of cases.

In his Brief on Appeal, Plaintiff cites federal case law[2] for the proposition that allegations in a complaint limiting damages is determinative of the amount in controversy. (Plaintiff's Brief on Appeal, p 14, 15, 16, 19, 23-24). To buttress his argument, he proffers an endless string citation of cases limiting recovery to the amount alleged in the complaint. (Id., p 24-26).

All of that authority is appropriate where the plaintiff's case alleges a one-time entitlement which will be forever vindicated by a single monetary award. However, it is a misfit where the value of the entitlement asserted exceeds the amount owed at the time the complaint is filed.

The latter situation obtains in a claim for first-party no-fault expenses. The No-Fault Act provides for unlimited lifetime medical expenses. That is the entitlement asserted in a lawsuit seeking no-fault benefits for injuries allegedly sustained in an alleged auto accident, where the insurer denies liability for such benefits.

---

[2]State Farm does a fine job of disposing of the Michigan authority cited by Plaintiff. Accordingly, ACIA will not repeat that discussion.

Once a plaintiff obtains a judgment that he sustained bodily injury in an automobile accident, those facts are res judicata in any subsequent lawsuit for further benefits.[3] *McMillan v ACIA*, 195 Mich App 463, 468; 491 NW2d 593 (1992). Defining the amount in controversy solely on the basis of the amount alleged in the lawsuit establishing those propositions vastly understates the value of the right at issue.

There is a body of federal law that addresses that problem. The governing principle is that in such cases, the amount in controversy is the value to the plaintiff of his entitlement to coverage under the policy. That principle was articulated in a recent Sixth Circuit decision.

In *Freeland v Liberty Mutual Ins Co*, 632 F2d 250 (6th Cir 2011), the plaintiffs sought a declaration that their policy provided $100,000 in uninsured/underinsured motorist coverage. The insurer maintained that the policy provided only $25,000 in coverage. *Id.* at 252.

The insurer removed the action to the federal district court, which granted summary disposition in favor of the insurer. The plaintiffs appealed. Although the plaintiffs did not challenge the subject matter jurisdiction of the federal court, the Sixth Circuit did so *sua sponte*. 632 F2d at 252.

The appellate court articulated the applicable rule as follows:

> "'[W]here a party seeks a declaratory judgment, "**the amount in controversy is not necessarily the money judgment sought or recovered, but rather the value of the consequences** which may result from the ligitation.'"'

Id. at 253 (emphasis added). That principle was applied in two insurance cases which are instructive here.

---

[3]The text discussion ignores any statutory or common law disqualifications from benefits.

In *Ballard v Mutual Life Ins Co*, 109 F2d 388 (5th Cir 1940), the insurer filed a declaratory judgment action in federal court to determine its liability for disability benefits. *Id.* at 389. The terms of the policies required payment of $150/month. *Id.* The insured argued that the federal court lacked jurisdiction, because the amount currently owed did not meet the jurisdictional amount. *Id.*

The insurer responded that the insured was only 42 years old, had a reasonable life expectancy of many years, and was alleged to be permanently and totally disabled. 109 F2d at 389. The federal appellate court found that the value of the insured's claim was "not overstated" by the insurer. It added:

> "**The amount in controversy is the value of the claim** which the company is seeking to have cancelled in the court below, **not the amounts sued for** in the state courts."

Id.

In *Lester v Prudential Ins Co*, 24 F Supp 54 (D Mass 1938), the insurer ceased its $100/month disability payments on the ground that the insured was no longer totally and permanently disabled. *Id.* at 55. At the time that the plaintiff filed his complaint, ten payments were overdue. *Id.* Accordingly, he challenged the insurer's removal of the action to federal court on the ground that the amount in controversy did not meet the $3,000 jurisdictional requirement. *Id.*

The insurer responded by pointing out that if the plaintiff prevailed, the payments would eventually far exceed the jurisdictional limit. The court agreed:

> "Obviously, **the monetary value of the rights which the plaintiff sought to protect was not limited to the installments due at the time of the suit**. So far as it was then possible to prophesy, **there was a probability, amounting to a**

> **presumption sufficient to support defendant's allegation in its petition, that the amount in controversy exceeded the sum of $3,000 exclusive of interest and costs**."

Id. at 56 (emphasis added).

Both of the cases just discussed determined the amount in controversy not on the basis of the monetary award sought, but on the ongoing value of the entitlement to insurance proceeds. The fact that both actions were declaratory judgment cases is not a material distinction. In the context of the Michigan No-Fault Act, a determination that a plaintiff sustained injuries arising out of a motor vehicle accident is tantamount to a declaratory judgment.

Plaintiff cited an unpublished federal decision for the proposition that "wholly speculative" future consequences should not be considered. (Plaintiff's Brief on Appeal, p 19). However, two other federal cases place that rule in perspective.

In *Food Fair Stores, Inc v Food Fair, Inc*, 177 F2d 177 (1st Cir 1949), the defendant appealed from a decree enjoining it from using the words "Food Fair" in its business. *Id.* at 179. It argued that there was no federal jurisdiction due to lack of a sufficient amount in controversy. *Id.* at 180.

The plaintiff's damages consisted entirely of the dilution of the value of its trade name in Massachusetts. 177 F2d at 183. The defendant argued that the possibility of the plaintiff's expanding its business into Massachusetts was too remote to support a finding of the required jurisdictional amount in controversy. *Id.* at 184.

The First Circuit rejected that claim:

> "There is undisputed testimony . . . that . . . the plaintiff had several times in recent years negotiated for the acquisition of stores in Massachusetts, and . . . expansion into Massachusetts remained in the active contemplation of the plaintiff's offices."
>
> * * * *
>
> "And the foregoing disposes of the defendant's second contention also. **It is not accurate to say that a finding of amount in controversy cannot be based upon future or contingent damages. It cannot be based upon a mere possibility of future harm, but it can be upon a present probability of such harm**. The distinction to be observed is a familiar one between a probability and a possibility, not between present and future, or certain and contingent."

Id. at 184 (emphasis added).

That principle was also applied in *Martin v City Water Co*, 197 F 462 (WD Mo 1912). In that case, the plaintiff filed an action to prevent the defendant from increasing his water rates. The defendant removed the action to federal court. *Id.* at 463.

The plaintiff argued that the only amount in controversy was the amount of the increase in his water rates, which was then less than the jurisdictional limit. *Id.* at 464. However, he also argued that his right to be free from rate increases was perpetual. *Id.* In rejecting the jurisdictional challenge, the court responded:

> "If this be so, certainly an important right claimed by the defendant is at stake. If this be determined adversely to the defendant, it must lose a portion of its rate established, or retire from business. **In due time also the amount concededly involved would ripen into the necessary jurisdictional amount**. Defendant is not compelled to await this result."

Id. at 465-66 (emphasis added).

With the exception of the rare contested no-fault case that does not involve ongoing treatment and services, future claims are not only probable, they are virtually certain. The district

court cases repeatedly litigated by Mr. Fortner illustrate that point. The undersigned attorney of counsel has personally litigated three successive no-fault lawsuits filed by Mr. Fortner on behalf of one Senior Smith. 36th District Court No. 07-143978, Wayne County Circuit Court No. 11-002535, Court of Appeals No. 304144; 36th District Court No. 08-151090-NF, Wayne County Circuit Court No. 11-012954-AV, Court of Appeals No. 311374; and 36th District Court No. 11-119952-GC, Wayne County Circuit Court No. 14-014822-AV.

In addition to that, attached is 36th District Court Administrative Order 2013-10. (Appendix C). Attached thereto is a list of cases filed by Mr. Fortner. Listed therein are seven clients on whose behalf Mr. Fortner has filed successive no-fault actions. All of which illustrates the likelihood of future claims arising from a finding that a plaintiff sustained an injury in an automobile accident.

In sum, the federal cases cited by Plaintiff are appropriate where the claim alleges a one-time entitlement to a money judgment. However, first-party no-fault cases involving ongoing treatment establish a right to continuing benefits once it is determined that the plaintiff sustained an injury arising out of a motor vehicle accident. In such cases, the amount in controversy is the value to the plaintiff of the entitlement asserted. That amount will almost invariably exceed the amount of money damages the plaintiff is going to accept.

II. THE MOTIVATION TO FILE IN 36th DISTRICT COURT IS TO PREVAIL ON CASES THAT WOULD LOSE IN WAYNE COUNTY CIRCUIT COURT. THE SHAM JURISDICTIONAL ALLEGATION IN THE COMPLAINT IS NECESSARY TO THAT STRATAGEM. TO THE EXTENT THAT IT PURPORTS TO CONVEY THE VALUE OF THE RIGHT ASSERTED, IT IS A FRAUD ON THE COURT.

ACIA adopts State Farm's presentation of the case law governing fraudulent pleading. (State Farm's Brief on Appeal, p 31-34). In the following discussion, ACIA will underscore the sham nature of Plaintiff's jurisdictional pleading.

State Farm indicated that it was "unaware of Plaintiff and her trial counsel's exact motives for pursuing this action in the district court". (State Farm's Brief on Appeal, p 30). Although not of record in the instant case, the motivation of Plaintiff's attorney is of record in other cases of which this Court should take judicial notice, MRE 201(b)-(c), (e).[4] At the outset, ACIA points out that it presents the following material for the sole purpose of demonstrating that the jurisdictional allegations in Plaintiff's attorney's 36th District Court Complaints are a sham. They have nothing to do with the value of the claim being asserted. (See Issue I., *supra*). Rather, they are an artifice to facilitate litigating otherwise suspect cases in a favorable venue. To the extent they purport to be anything else, they are a fraud on the court.

In the course of litigating this issue in circuit court, Mr. Fortner's co-counsel explained why Mr. Fortner considers the 36th District Court to be a favorable venue. In order to avoid any

---

[4]The material referenced in the text discussion is contained in the records of Michigan's One Court of Justice, Const 1963, art VI, §1; *Prawdzik v Heidema Bros, Inc*, 352 Mich 102, 112, 89 NW2d 523 (1958), or of the United States District Court for the Eastern District of Michigan. As such, it is squarely within the ambit of MRE 201(b)(2) ("capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

suggestion of mischaracterizing that explanation, ACIA will (with apologies) quote it in its entirety:

> "MR. BERRIS: I don't know if it's gaming the system, but he's trying to do what's best for his clients looking at the big picture.
>
> "And Mr. Fortner has been practicing in this court and in district court for just over 20 years now and he knows that **there's a difference in the juries between district court and circuit court**.
>
> "So the question is where is he going to get the best results for his client. And based on all that experience he feels possibly waiving some damage claims by filing in district court is just the better option.
>
> "Counsel is right, there were certain discrepancies in the testimony here, we --
>
> "THE COURT: **Perhaps he also gets attorney fees a little more** --
>
> "MR. BERRIS: That's possible too, but --
>
> "THE COURT: -- **Down in the district court as opposed to** --
>
> "MR. BERRIS: **That's definitely possible**."
>
> * * * *
>
> "[MR. BERRIS]: **And I just think that the jury composition in district court is going to be, of course, more likely to look at his point of view** and look beyond the details and say yes, you know what, there are discrepancies in your testimony. But the big picture is yes, you were involved in a car accident and you suffered injuries.
>
> "**And I don't think that the jury here in Wayne County might be quite as sympathetic**, okay, and that is what Mr. Fortner has decided to do.
>
> "So I think, I think it's kind of --
>
> "THE COURT: Well is it a jury's job to be sympathetic or is it a jury's job to decide facts and --

"MR. BERRIS: Well, but you bring your own experiences with you as a juror, you can't exclude that really. I mean everybody has a background and maybe has been affected by the system somehow.

"**Whether it be an insurance company or bank or something and you bring your own experiences with you**, you can't, you can't ignore that, and so **there's just a different makeup of the jury here in district court versus Wayne County**."

* * * *

"MR. BERRIS: That's right, and that's of course why do you think, why do you think the insurance companies want to be here in Wayne County, because they know that they have a better chance of getting a no-cause jury in Wayne County than they do in 36th District Court. They're going to a jurisdiction --"

* * * *

"THE COURT: But you got to admit, it's a little unorthodox for him to go to the client and say well wait a minute, you're coming to me in my office and you tell me you've got 50,000 or 40 or 75,000.

"But hey, you know what, I want to tie your hands and we're only going to get up to 25,000 here in the circuit, in the district court.

"Why, why would anybody do that?

"MR. BERRIS: **Because if you come here let's say you've got a 95 percent of chance of getting no cause, so where is the better result. Is it zero here or is it 25,000 in district court, look at the big picture**. I mean that's what he's trying to do, where is the big picture.

"Some cases he files here, but it's, you know, he knows his clients, he knows this is the case, he knows where it is better to be.

"**So you've got Mr. Smith, like I said, who's all over the map in his testimony. You konw, he may feel that a jury will not rule in his favor based on all the inconsistencies here in Wayne County, but in district court he might have a better opportunity**."

(*Senior Smith v State Farm Mutual Automobile Ins Co*, Wayne County Circuit Court No. 11-002535-AV, 6/27/13 Motion Hearing [Appendix A], p 9, 10-11, 11, 19) (emphasis added).[5] That point was reprised in a federal lawsuit what Mr. Fortner filed against Judge Talbot:

> "13. That many of **the PIP cases filed by Mr. Fortner in the 36th District Court are cases where, based on the differing jury pools, his clients** (who are mostly low income and minorities) **would have a significantly lower chance of winning their cases in the Wayne County Circuit Court** (whose jury pool is primarily comprised of white, suburban residents)."
>
> * * * *
>
> "15. That many No-Fault insurance carriers have become irate over Mr. Fortner's legal strategy of filing PIP cases in the 36th District Court on behalf of his poor, minority clients because, although the insurance company's exposure to a judgment is limited to $25,000.00 in the district court, the insurance companies perceive themselves having improved chances of winning a 'no cause' verdict if such cases were filed in circuit court where the jury's lack of ethnic or racial diversity and almost completely Caucasian, unlike the clients represented by Attorney Fortner."

(*Fortner v 36th District Court*, United States District Court, Eastern District of Michigan, No. 4:13-cv-13671, Complaint and Demand for Trial by Jury [Appendix B], ¶¶13, 15) (emphasis added).

The foregoing constitute admissions by Mr. Fortner that his jurisdictional allegations have nothing to do with the value of the claims he is asserting. Rather, they are nothing more than sham allegations whose purpose is to keep cases in the 36th District Court. Insofar as they purport to convey the value of the right asserted, they are a fraud on the court.

---

[5]The transcript was actually of oral argument on appeal from 36th District Court No. 07-143978. The undersigned attorney of counsel has litigated two other Senior Smith cases: 36th District Court No. 08-151090-NF, Wayne County Circuit Court No. 11-012954-AV, Court of Appeals No. 311374; and 36th District Court No. 11-119952-GC, Wayne County Circuit Court No. 14-014822-AV.

Accordingly, even if the allegations of the Complaint would normally define the amount in controversy, Plaintiff's sham allegations in the instant case constitute a fraud on the court and, therefore, can and should be ignored.

RELIEF

Amicus Curiae, AUTO CLUB INSURANCE ASSOCIATION, respectfully requests this Honorable Court to affirm the opinion of the Court of Appeals in all respects.

JAMES G. GROSS, P.L.C.
BY:/s/James G. Gross
JAMES G. GROSS (P28268)
Attorneys for Amicus Curiae ACIA
615 Griswold Street, Suite 723
Detroit, MI 48226
(313) 963-8200

Dated: June 15, 2015